

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEHAN ZEB MIR, M.D.,

Plaintiff,

v.

KIMBERLY KIRCHMEYER, et al.,

Defendants.

Civil No. 12cv2340-GPC (DHB)

**ORDER GRANTING
PLAINTIFF'S *EX PARTE*
APPLICATIONS TO COMPEL
DEPOSITIONS OF KIMBERLY
KIRCHMEYER AND SHARON
LEVINE**

[ECF Nos. 163, 165]

On June 8, 2016, Plaintiff Jehan Zeb Mir, M.D. ("Plaintiff") filed two *ex parte* motions requesting the Court compel the depositions of Defendant Kimberly Kirchmeyer ("Kirchmeyer") and Defendant Sharon Levine ("Levine"). (ECF Nos. 163, 165.) Kirchmeyer and Levine opposed the motions on June 24, 2016. (ECF Nos. 171, 172.) For the reasons set forth below, Plaintiff's motions are **GRANTED**.

I. BACKGROUND

Plaintiff initiated this action on September 25, 2012, alleging Defendants wrongfully took disciplinary action against Plaintiff's physician's and surgeon's certificate. (ECF No. 1.) Plaintiff specifically named Kirchmeyer and Levine as Defendants. (*Id.*) On May 11, 2016, the Court issued an order on Defendants' motion to dismiss, and held that the only

1 remaining claim in this action is Plaintiff's § 1983 claim for prospective relief against
 2 Kirchmeyer and Levine in their official capacities. (ECF No. 159.)

3 On April 14, 2016, Plaintiff served three deposition notices for the depositions of
 4 Kirchmeyer, Levine, and Linda K. Whitney ("Whitney").¹ (ECF Nos. 163 at 13-42.)
 5 Plaintiff unilaterally scheduled Levine and Kirchmeyer's depositions for May 9 and May
 6 10, 2016, in Sacramento, California. (*Id.* at 14, 25.) Plaintiff scheduled Whitney's
 7 deposition for May 20, 2016 in Kailua-Kona, Hawaii. (*Id.* at 36.) All three deposition
 8 notices also included Requests for Production of Documents. (*Id.* at 15-22; 26-33; 37-41.)

9 Plaintiff indicates that on April 17, 2016, he purchased airfare to travel to Hawaii
 10 for Whitney's deposition. (*Id.* at 4.) Plaintiff purchased his airline ticket prior to conferring
 11 with defense counsel regarding Whitney's availability. (*Id.*)

12 On April 21, 2016, counsel for Defendants received Plaintiff's deposition notices.
 13 (ECF No. 172 at 11, ¶ 2.) Thereafter, on or about April 26, 2016, defense counsel notified
 14 Plaintiff that the witnesses were not available for deposition on the dates selected by
 15 Plaintiff. (*Id.* at ¶3; ECF No. 163 at 4.) Defendants' counsel also asserted several
 16 objections to the depositions.² Plaintiff states that he incurred a \$200.00 airline rebooking
 17 fee as a result of the cancellation of Whitney's deposition. (ECF No. 163 at 4, 43.)

18 On June 8, 2016, Plaintiff filed the instant *ex parte* motions requesting the Court to
 19 compel Kirchmeyer and Levine to appear for deposition. (ECF Nos. 163, 165.) Plaintiff
 20 also requests the Court order Defendants to reimburse the \$200.00 airline rebooking fee he
 21 paid in connection with the cancelled deposition of Whitney. (*Id.*)

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25 ¹ At the time Whitney was a named Defendant. Whitney has since been dismissed from the case. (See
 26 ECF No. 159.)

27 ² For instance, counsel asserted Kirchmeyer and Levine were not subject to deposition pursuant to their
 28 status as agency heads or other top governmental executives or officials. (See ECF No. 163 at 44-46.) Defendants have apparently abandoned this objection, and do not raise it in their oppositions to the motions to compel.)

II. ANALYSIS

A. Failure to Comply with the Court's Procedures for Discovery Disputes

Plaintiff has failed to comply with this Court's procedures for filing discovery motions.³ Plaintiff has not complied with Section IV.C. of the undersigned Magistrate Judge's Civil Chambers Rules which requires the filing of a Joint Motion for Determination of Discovery Dispute.⁴ It also does not appear Plaintiff adequately met and conferred with Defendants' counsel prior to filing the instant motion. *See Fed. R. Civ. P. 37(a); Civ. L.R. 26.1(a).* In addition, Plaintiff failed to comply with the Court's rules governing *ex parte* applications. *See Civ. L. R. 83.3(h)(2).* However, in the interest of justice, the Court will address the merits of the parties' dispute. **As Plaintiff has already been advised (ECF No. 169), any future discovery motion will not be considered unless the Court's rules and procedures are complied with.**

B. Depositions of Kirchmeyer and Levine

Federal Rule of Civil Procedure 30(a)(1) authorizes a party to “depose any person, including a party, without leave of court. . . .” Fed. R. Civ. P. 30(a)(1). A party objecting to deposition carries “a heavy burden” to show why a properly noticed deposition should not go forward. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). The scope of questioning at a deposition is broad – a party may ask any question relating to “any nonprivileged matter that is relevant to any party’s claim or defense.” Fed.R.Civ.P 26(b)(1). See also 11 James M. Wagstaffe, *Federal Civil Procedure Before Trial* § 1542 (2016). However, under Rule 30(a)(1), non-entity witnesses are only obligated to testify to matters that are within their own knowledge. (*Id.* at §1543.) Non-entity witnesses are not required to review documents or prepare in advance. Further, Rule 30(a)(1) does not

³ The Court notes that Plaintiff has filed numerous discovery motions in violation of the Court's rules. (See ECF Nos. 169, 170, 174.)

⁴ The Chambers Rules are available at:

<https://www.casd.uscourts.gov/Rules/Lists/Attachments/17/Bartick%20Civil%20Chambers%20Rules.pdf>.

1 require the deposition notice to a non-entity witness to identify the matters on which
 2 questions will be asked. *Bennett v. The Westover, Inc.*, 27 F.Supp. 10 (S.D.N.Y. 1938). In
 3 contrast, when a party seeks to depose an entity, such as a corporation, partnership, etc.,
 4 the deposition notice must describe with “reasonable particularity the matters for
 5 examination.” Fed.R.Civ.P. 30(b)(6). The entity has a duty to designate one or more
 6 individuals to testify on its behalf, and must ‘educate’ or prepare the witnesses to testify as
 7 to the matters identified in the deposition notice. *Id.*; *Bowoto v. ChevronTexaco Corp.*,
 8 2006 WL 294799, *1 (N.D. Cal. Feb. 7, 2009).

9 Here, Levine argues the Court should not compel her deposition because Plaintiff
 10 already possesses the information he seeks to inquire about at the deposition. However,
 11 Plaintiff is entitled to depose both Levine and Kirchmeyer, as they are parties to this action.
 12 Fed.R.Civ.P. 30(a)(1); *Dysthe v. Basic Research, LLC*, 273 F.R.D. 625, 629 (C.D. Cal.
 13 2011) (“Defendants are certainly entitled to take the deposition of a party.”). Furthermore,
 14 the fact that Plaintiff has access to other discovery does not eliminate Plaintiff’s right to
 15 depose Defendants. *See Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 477 (S.D.
 16 Ohio 2014) (noting that “parties to litigation, even those who may have offered testimony
 17 at an earlier hearing, are still presumptively subject to being deposed.”); *Greenberg v. Safe
 18 Lighting Inc.*, 24 F.R.D. 410, 411 (S.D.N.Y. 1959) (“There is no burden on the party
 19 seeking the deposition to show that written interrogatories would not be sufficient for its
 20 purposes.”); *Muzak Corp. v. Muse-Art Corp.*, 16 F.R.D. 172, 173 (E.D. Pa. 1954) (“The
 21 right of the plaintiff to orally examine the defendant is not affected by the fact that the
 22 defendant has now agreed to permit plaintiff to inspect its books and records.”).
 23 Accordingly, the Court finds Plaintiff may depose Levine.

24 Kirchmeyer argues the Court should not compel her deposition because she does not
 25 have knowledge about the topics of examination described in the deposition notice. She
 26 also complains that in his motion to compel, Plaintiff included additional areas to the scope
 27 of her deposition that were not in the original notice. Kirchmeyer’s arguments fail for two
 28 reasons. First, the fact that Kirchmeyer claims she has insufficient information about a

1 potential topic of inquiry is insufficient to excuse her from appearing for deposition. *See*
 2 *e.g. Naftchi v. New York University Medical Center*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997)
 3 (holding that “in ordinary circumstances, [it] does [not] matter that the proposed witness is
 4 a busy person or professes lack of knowledge of the matters at issue, as the party seeking
 5 the discovery is entitled to test the asserted lack of knowledge.”); *Amherst Leasing Corp.*
 6 *v. Emhart Corp.*, 65 F.R.D. 121, 122 (D. Conn. 1974) (“the general rule is that a claimed
 7 lack of knowledge does not provide sufficient grounds for a protective order; the other side
 8 is allowed to test this claim by deposing the witness.”).

9 Second, the paragraph in the deposition notice identifying the matters for
 10 examination is superfluous information. The notice was issued to an individual, and not
 11 an entity. Therefore, Rule 30(b)(6)’s requirement that a deposition notice must describe
 12 the matters for examination is inapplicable here. Fed.R.Civ.P. 30(b)(6). Moreover, even
 13 assuming the matters for examination were properly included in the deposition notice, the
 14 notice does not control the scope of the deposition. *See Campbell v. Facebook, Inc.*, 310
 15 F.R.D. 439, (N.D. Cal. 2015) (noting the scope of questioning is not defined by the notice
 16 of deposition, but by Rule 26(b)(1)); *Employers Ins. Co. of Wausau v. Nationwide Mut.*
 17 *Fire Ins. Co.*, 2006 WL 1120632, *1 (E.D.N.Y. 2006) (“[A] notice of deposition cannot be
 18 used to limit what is asked of the designated witness, but rather, it ‘constitute[s] the
 19 minimum, not the maximum, about which a deponent must be prepared to speak.’”);
 20 *UniRAM Technology, Inc. v. Monolithic Sys. Tech. Inc.*, 2007 WL 915225, *2 (N.D. Cal.
 21 March 23, 2007) (“[T]he ‘reasonable particularity’ requirement of Rule 30(b)(6) cannot be
 22 used to limit what is asked of the designated witness at deposition.”). Therefore, Plaintiff
 23 may depose Kirchmeyer and may ask any question relevant to the claims remaining in this
 24 action.

25 The Court finds Kirchmeyer and Levine have failed to meet their burden to show
 26 that they should not be deposed. Accordingly, the Court will grant Plaintiff’s motions to
 27 compel. Kirchmeyer and Levine shall appear for deposition within the next 30 days, and
 28 the Court will extend the discovery cutoff for purposes of completing these two depositions

1 only. Plaintiff is advised that Kirchmeyer and Levine are not obligated to ‘fully review’
2 any information, or otherwise prepare to ‘answer all questions’ prior to the depositions.
3 The provisions in the deposition notices to that effect are not binding, and may be
4 disregarded by Defendants.⁵

5 **C. Document Requests Accompanying Deposition Notices**

6 Rule 30(b)(2) provides that a deposition notice may be accompanied by a Request
7 for Production of Documents under Rule 34.⁶ Fed.R.Civ.P. 30(b)(2). District courts have
8 broad discretion to limit the scope of any discovery method if it determines that “the
9 discovery sought is unreasonably cumulative or duplicative, or can be obtained from some

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12 ⁵ Specifically, Kirchmeyer may disregard the following provision:

13 PLEASE TAKE FURTHER NOTICE that you will be particularly deposed on the merits
14 of the Decision taken by you in 2011 in your Petition to Revoke Probation and 2012
15 Decision revoking Plaintiff Jehan Zeb Mir, MD California Medical License. That you are
16 expected to fully review the material or any other matter or prior medical board of
17 California decisions in 2006, 2008, and 2010 upon which you base your 2011 Petition to
18 Revoke Probation and 2012 Decision revoking medical license before deposition and to be
19 fully prepared to answer all questions.

20 In the event you are not fully prepared to be deposed, the deposition will be adjourned and
21 Plaintiff will request sanctions from the District Court.

22 (ECF No. 163 at 25.)

23 Levine may disregard the following provision:

24 PLEASE TAKE FURTHER NOTICE that you will be particularly deposed on the merits
25 of the Decision taken by you in 2010 revoking, staying and placing Plaintiff Jehan Zeb
26 Mir, MD on probation. That you are expected to fully review the material or any other
27 matter or prior decision upon which you based your 2010 Decision before deposition and
28 to be fully prepared to answer all questions. In the event you are not fully prepared to be
deposed, the deposition will be adjourned and Plaintiff will request sanctions from the
District Court.

(ECF No. 165 at 13.)

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30 ⁶ When a deposition notice includes a Request for Production of Documents, a minimum of 30 days’
31 notice is required. Fed.R.Civ.P 34(b)(2)(A). Here, the deposition notice to Kirchmeyer only provided 26
32 days’ notice, and the notice to Levine provided 25 days. However, Defendants did not seek a protective
33 order based on notice, and it does not appear Defendants are objecting to the depositions due to insufficient
34 notice.

1 other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P.
 2 26(b)(2)(C)(I).

3 Here, Kirchmeyer and Levine both argue the Requests for Production attached to
 4 their deposition notices are duplicative of Plaintiff’s prior written discovery requests. The
 5 Court has compared the Requests for Production attached to the deposition notices with
 6 Plaintiff’s prior Request for Production to Kirchmeyer. The Court finds that many of the
 7 Requests are duplicative, cumulative, or repetitive, and therefore, it would be unduly
 8 burdensome to require Defendants to respond. Specifically, the Court sustains Kirchmeyer
 9 and Levine’s objections that Requests A-C, F-G and I-O are duplicative. The Court will
 10 not order Defendants to respond to these Requests. With regard to Requests D and E,
 11 Defendants indicate all non-privileged documents are already in Plaintiff’s possession, or
 12 have already been produced to him. Kirchmeyer and Levine concede Requests H, P, and
 13 Q are not duplicative. Accordingly, the Court directs Kirchmeyer and Levine to respond
 14 to Requests D-E,⁷ H, P and Q, and produce all responsive documents at their depositions.

15 **D. Request for Reimbursement of \$200.00**

16 Rule 30(b)(1) requires that a deposition notice “give reasonable written notice to
 17 every other party.” Fed.R.Civ.P. 30(b)(1). Rule 30 does not require the noticing party to
 18 confer with opposing counsel before selecting the deposition date. However, the Court’s
 19 Local Rules require parties to “confer with opposing counsel before scheduling or
 20 rescheduling hearing, depositions, and meetings. . . .” Civ.L.R. 83.4(a)(1)(g). Moreover,
 21 it is the customary and prudent practice to consult with opposing counsel about scheduling,
 22 particularly in a situation such as this case, where a deposition will be held in a remote
 23 location.

24 Here, Plaintiff unilaterally scheduled Whitney’s deposition in Hawaii without
 25 consulting with defense counsel. Three days after serving the deposition notice – and prior
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 28 ⁷ To the extent documents responsive to Requests D and E have already been produced, Kirchmeyer and
 Levine may indicate as such in their responses.

1 to confirming that Whitney and her counsel were available on date he selected for the
2 deposition – Plaintiff purchased an airline ticket that was not fully refundable. (ECF No.
3 163 at 4.) Defense counsel timely notified Plaintiff that Whitney’s deposition could not go
4 forward on the date he selected. (*Id.*) Subsequently, Plaintiff incurred a \$200.00 airline
5 rebooking fee. (*Id.* at 4, 43.) Plaintiff now requests that the Court order Defendants to
6 reimburse him the \$200.00 fee. By failing to confer with Defendants prior to scheduling
7 Whitney’s deposition and prior to purchasing his ticket, Plaintiff assumed the risk that the
8 deposition might need to be rescheduled. The Court does not find good cause to shift the
9 expense of the airline rebooking fee to Defendants. Therefore, the Court declines to order
10 Defendants to reimburse Plaintiff.

11 IV. CONCLUSION

12 For the foregoing reasons, **IT IS HEREBY ORDERED** as follows:

13 1. Plaintiff’s *ex parte* motion to compel the deposition of Kimberly Kirchmeyer
14 is **GRANTED**.

15 2. Plaintiff’s *ex parte* motion to compel the deposition of Sharon Levine is
16 **GRANTED**.

17 3. The depositions of Kirchmeyer and Levine shall be completed by **July 29,**
18 **2016**. The discovery cut-off shall be extended to July 29, 2016, for purpose of completing
19 these two depositions only. Kirchmeyer and Levine shall respond to the Requests for
20 Production of Documents that were attached to their deposition notices, as directed above.

21 4. Plaintiff’s request for reimbursement of the \$200.00 airline rebooking fee is
22 **DENIED**.

23 **IT IS SO ORDERED.**

24 DATED: June 29, 2016

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26 DAVID H. BARTICK
27 United States Magistrate Judge
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